No. 86-351 (3)

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

CITY OF ST. CHARLES and
FRED T. L. NORRIS, MAYOR
Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS,
KATHRYN GIUNTOLI and JOAN MARKLEY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The Opinion of the Court of Appeals for the Seventh Circuit, per Judge Richard Posner, is consistent with the opinions of this Court and of other courts of appeals in Establishment Clause cases. Moreover, the Opinion merely affirms the issuance of a preliminary injunction by the district court and is not a final opinion on the merits. Consequently, further review is not warranted. The issue before the Court is:

Whether the court of appeals was correct in affirming the district court's finding that plaintiffs had demonstrated a reasonable likelihood of success on the merits, where the evidence showed that the city erected and illuminated, during the holiday season, a 35-foot latin cross, atop a tall public building, isolated from any secular holiday display, and that the cross was not a traditional Christmas symbol, but rather the universal symbol of Christianity?

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RESPONDENTS' BRIEF IN OPPOSITION

The petition for a writ of certiorari in this case seeks review of the opinion of the Seventh Circuit Court of Appeals that affirmed the grant of a preliminary injunction. The respondents, the American Civil Liberties Union of Illinois, Kathryn Giuntoli and Joan Markley, respectfully request that this Court deny the petition.

STATEMENT OF THE CASE

This case arises from a motion for a temporary restraining order which was brought by the American Civil Liberties Union of Illinois ("ACLU") and two of its members, residents of the City of St. Charles, Illinois, to enjoin the city from illuminating a three-story high cross on the rooftop radio tower of the city Fire Department. Following a one-day evidentiary hearing on plaintiffs' motion, the district court, on December 5, 1985, preliminarily enjoined St. Charles from illuminating the cross "pending a final adjudication of this action." Appendix ("App.") 32a. Although the hearing proceeded on the motion for a temporary restraining order, the court chose to construe the motion as one for a preliminary injunction in order to afford the city the opportunity for appeal before the end of the holiday lighting season. App. 31a. However, St. Charles did not seek a stay of the district court's order and waited until December 30 to file its notice of appeal.

The Court of Appeals for the Seventh Circuit unanimously affirmed the preliminary injunction, holding that even on the "incomplete, because hastily compiled" record before it, there was ample evidence to establish a likelihood that the plaintiffs would prevail at trial, that the district court had acted within its discretion, and that there was no basis for disturbing the preliminary injunction. App. 6a, 12a, 14a, 19a. The reviewing court also agreed that in the balance of injuries, the plaintiffs would sustain greater injury if the preliminary injunction were wrongly denied than the defendants would sustain if it were wrongly granted. App. 6a, 17a-18a.

The evidence showed that St. Charles illuminates a three-story high cross on the rooftop communications tower of its municipal fire station during the period from Thanksgiving through New Year's Day. The cross is lighted on the rooftop of one of the tallest structures in St. Charles. It stands 75 feet above the ground and it is isolated by hundreds of feet from any other tall structure. App. 2a. The illuminated cross "beam[s] over the rooftops of St. Charles" and is an

overpowering feature of St. Charles' annual lighting display. App. 2a, 30a.

The district court and the court of appeals agreed that the evidence at the hearing showed that the cross is not a symbol historically or traditionally associated with Christmas, and that the cross is a distinctly *religious* symbol. App. 9a, 28a. The court of appeals noted that the cross is also a *sectarian* religious symbol which is not even shared by all believers in the Christian faith. App. 9a.

The testimony at the hearing revealed that the "strings of lights" were hung for the express purpose of forming a cross and the cross has been retained because proponents considered that "St. Charles was a Christian community." App. 3a, 26a; Hearing Transcript [Tr.] at 100. The cross is perceived by citizens of St. Charles as "an obvious endorsement by [the] City of. . .Christianity." Tr. at 41. The lower courts and witnesses for both sides agreed that the cross is a universal symbol of the Christian religion. As the Seventh Circuit observed, "when lit up at night the aerial and cross-bar form the unmistakable symbol of Christianity." App. 2a.

Although no expert testimony was presented because of the expedited basis on which the motion was heard, there was lay testimony by both plaintiffs' and defendants' witnesses that the historical significance of the cross relates to the Easter season and the crucifixion, not Christmas, and that unlike a creche, a cross is neither a traditional symbol of Christmas nor a traditional part of Christmas holiday displays. The district court found that the plaintiffs had made the requisite showing that "unlike a creche, a cross on a building, even during the Christmas season, does not ordinarily conjure up in a viewer's mind the historical antecedents of the Christmas holiday." App. 29a. The evidence showed that the cross is not commonly displayed in secular settings nor amid secular objects, and the normal purpose for display of the cross on top of a building is to indicate an affiliation with the Christian religion, like a church or a parochial school. App. 14a, 29a.

The district court held that "when a governmental body adorns a public building with a religious symbol so universally identified as a symbol of one religion as is the illuminated cross on the St. Charles fire station, it exceeds the boundaries of neutral accommodation of religion. The Establishment Clause prohibits such conduct." App. 32a. The court of appeals agreed that this prominent display "dramatically conveys a message of government support for Christianity." App. 9a. Such support is "not only religious but sectarian." *Id.*[1]

Respondents did not seek a stay of the Seventh Circuit's decision. They did not argue before that court, and do not argue here, that they are harmed by the continuing effect of the preliminary injunction pending the district court's final adjudication on the merits.

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ISSUING THE PRELIMINARY INJUNCTION AND THE CASE SHOULD PROCEED TO A FULL TRIAL ON THE MERITS.

A. Petitioners Ignore the Preliminary Status of This Action.

Although the Petition reads as if a final decision had been rendered by the lower courts, the district court's decision to enjoin the illumination of the three-story high cross and the affirmance of that decision by the court of appeals were made in the context of a preliminary injunction; there was no

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[1] The district court issued its order on the basis of this unconstitutional effect, and made no ruling on whether the city had an unconstitutional purpose or an excessive entanglement with religion. However, the court noted that the "evident purpose" of including the cross in the Christmas display, as opposed to some symbol associated with the holiday, appeared to be the promotion of its religious message. App. 13a, 28a, 29a. Because the district court ruled only on the issue of the cross' likely effect, only this issue was properly before the court of appeals, and that is the basis on which that court affirmed.

opportunity for factual discovery by either party before the hearing, and the district court had to evaluate the likelihood of success on the merits without the benefit of a complete factual record. The city has offered no reason why this Court should take the unusual step of reviewing this interlocutory matter. Petitioners' brief reveals no quarrel with the lower courts' application of the standards for the issuance and review of a preliminary injunction. Those standards are well-settled by this Court, *see, e.g., University of Texas v. Camenish*, 451 U.S. 390, 395 (1981), and the lower courts here applied them faithfully.

Because the matter comes to this Court in the posture of a preliminary injunction, the only issue for review is whether the district court abused its discretion. *Synanon Foundation, Inc. v. California*, 444 U.S. 1307 (1979) (per Mr. Justice Rehnquist as Circuit Justice); *Brown v. Chote*, 411 U.S. 452, 457 (1973). Because the merits are not yet ready for review, the petition for a writ of certiorari should be denied and the litigation returned to the district court for discovery and the development of a full factual record, including expert testimony, at trial.

B. As the Court of Appeals Found, the District Court Was Correct in Finding the Facts and Balancing the Equities.

The second reason why a writ of certiorari should not issue here is that the district court correctly exercised its discretion in issuing the preliminary injunction, and its decision falls well within the standards set forth by this Court. In recent years, this Court has given the lower courts considerable guidance in applying the Establishment Clause to religious symbols erected by the state, most recently in *Lynch v. Donnelly*, 465 U.S. 668 (1984). It is difficult to imagine an act of government that more clearly conveys a message that one religion is favored over others than the erection and illumination of a giant cross atop a public building above the rooftops of the city.

In reviewing the trial court's application of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and with guidance from *Lynch*, the court of appeals concluded that "the only significance of the St. Charles cross. . .is religious." App. 14a. This Court has long recognized that the Establishment Clause prohibits a government from sending a message of endorsement of a particular religion, or from preferring one religion over all others, or over none at all. *Lynch v. Donnelly*, 465 U.S. at 688 (O'Connor, J., concurring); *Lemon v. Kurtzman*, 403 U.S. at 612-13; *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963). The St. Charles cross, by far the most prominent feature of the city's holiday display, unavoidably communicates a message of association and approval of Christianity which is far more than indirect, remote or incidental. App. 30a-31a. Because the plaintiffs showed a substantial probability of success in establishing this unconstitutional effect at trial, the court of appeals was correct in affirming the grant of a preliminary injunction.

The Seventh Circuit agreed with the district court's finding that there was a strong likelihood that a 35-foot cross located in a "highly prominent place in the display" unavoidably conveyed the message that St. Charles endorses the Christian religion. App. 14a. The Seventh Circuit noted:

> the Latin cross. . .is a symbol of Christianity. It is, indeed, the principal symbol of Christianity as practiced in this country today. When prominently displayed on a public building that is clearly marked as and known to be such, the city dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be.

App. 9a, 14a. Because of the undeniably religious - - and sectarian - - effect of the St. Charles cross upon the observer, and because the balance of equities favored the plaintiffs (App. 6a), the Seventh Circuit concluded that there was no error in the district court's analysis which would require rever-

sal of the preliminary injunction.[2]

There is no need for further review of this preliminary injunction. As the court of appeals concluded, the district court carefully reviewed the evidence before it, applied the appropriate legal standards for review of Establishment Clause questions, and did not err in finding that the plaintiffs had demonstrated a greater likelihood of prevailing on the merits than the defendants, as well as greater injury if the injunction were denied than the defendants would suffer if it were granted. A grant of the petition for a writ of certiorari is unnecessary and premature.

II. IN ANALYZING THE FACTUAL RECORD, THE LOWER COURTS CORRECTLY INTERPRETED *LYNCH v. DONNELLY*.

This Court's decision in *Lynch* established clear guidelines for determining whether a symbol with religious overtones may be included in a municipality's secular holiday display. The touchstone is tradition and the historical significance of the symbol in the secular celebration. *Lynch*, 465 U.S. at 680, 691. St. Charles has in essence argued that *Lynch* authorizes the inclusion of any religious symbol, no matter how distinctly religious its message or how unrelated to the particular holiday, under the guise of a celebratory purpose. If the city can display this cross, why not a giant crucifix? The lower courts correctly recognized that *Lynch* would not permit such

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[2] Petitioners' brief is inaccurate and misleading in its statements of the "holdings" and "reasoning" of the court below. Judge Posner's opinion did not conclude that the St. Charles cross was an attempt to establish Christianity as the official religion of St. Charles (see Petition at 7, 9, 10); nor did it "reason" that the cross was a secular decoration (see Petition at 9). In fact, these theories were hypotheticals which the court rejected as being "too simple." App. 18a. The court of appeals' holding was that the district court's factual findings were not "clearly erroneous" (Rule 52(a), Fed. R. Civ. P.), and that the court was correct in concluding that respondents had shown that they are likely to succeed on the merits at trial. App. 12a, 15a.

a result. *See* App. 28a.

St. Charles tries to equate the creche in *Lynch* with the cross at issue here. This analogy is faulty because the context of the St. Charles cross belies the contention that it is only "one part" of an overall secular display. It is also faulty because evidence at the preliminary injunction hearing showed that the cross is not a Christmas symbol.

The nativity scene in *Lynch* did not physically overpower the other secular symbols in the holiday display. The factual record of *Lynch* makes it clear that the creche was surrounded, in close proximity, by numerous other secular symbols of proportionate size that tended to diminish the overall impact of a predominantly religious message that otherwise might have existed. In marked contrast, the St. Charles cross "occupie[d] a highly prominent place in the display. . .". App. 14a.

Unlike a cross, the creche related directly to the holiday. Chief Justice Burger, writing for the Court, held that "because [the creche] depicts the historical origins of this traditional event long recognized as a National Holiday," its inclusion does not impermissibly endorse religion. *Lynch*, 465 U.S. at 680. Concurring, Justice O'Connor explained that the Pawtucket creche did not send a message of endorsement because it is a *traditional* symbol of the holiday which is very commonly displayed together with the purely secular symbols of Christmas. *Lynch*, 465 U.S. at 692. By contrast here, the lower courts found that the cross is not a traditional symbol of Christmas at all. App. 14a. Nothing in *Lynch* permits the universally recognized symbol of a single religion, which is not a symbol - - traditional or otherwise - - of Christmas, to be prominently erected and illuminated on

city property.[3] A cross does not evoke the traditional or historical roots of Christmas; it evokes the Christian religion itself and the events commemorated at Easter. The Seventh Circuit noted that the introduction of the cross -- the symbol of Christ's death and not his birth -- "strikes a discordant chord." App. 13a. As the evidence showed, the cross is not a common Christmas symbol; moreover, it is a purely religious symbol. The courts of appeals which have reviewed the constitutionality of a governmental display of a cross, as opposed to a creche, have agreed that a cross is a well-recognized sectarian Christian symbol, that it is not simply a symbol of "good will." *See, e.g., Friedman v. Board of County Commissioners,* 781 F.2d 777, 781 (10th Cir. 1985), *cert. denied* ___U.S.___, 106 S.Ct. 2890 (1986) (noting that the cross has symbolized outright oppression and persecution for Jews, Moslems, Irish Protestants and American Indians). *See also ACLU v. Rabun County Chamber of Commerce,* 698 F.2d 1098, 1103 (11th Cir. 1983)(affirming the lower court's finding that a cross is the universally recognized symbol of Christianity).

The St. Charles cross has been found, at least at the preliminary injunction stage, to carry connotations that go far beyond those of the creche reviewed in *Lynch.* The lower courts agreed that the evidence here shows that the cross is not a traditional Christmas symbol. To the contrary, "[t]he St. Charles cross unmistakably signifies Christianity. . .". App. 11a.

This is not a case like *Lynch* where a city has selected a symbol historically associated with the Christmas holidays which coincidentally has religious overtones. Nor is it a case

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[3] Unlike *McCreary v. Stone,* 739 F.2d 716 (2d Cir. 1984), *aff'd without opinion by an equally divided court,* 471 U.S. 83 (1985), there is no "public forum" issue here. Nothing but the latin cross has ever been displayed on the antenna atop the St. Charles fire station.

where a city has taken an arguably religious symbol and surrounded it with secular symbols of similar proportion, thus diminishing the message of endorsement that would be conveyed by the religious symbol standing alone. Instead, it is a case where a city has deliberately taken the most universally recognized symbol of one religion, placed it in the most prominent location in town, and left it isolated -- by a vast distance -- from any arguably secular display.

The Establishment Clause bars the majoritarian endorsement of one religion over all others, or over none. *Wallace v. Jaffree*, 472 U.S.___, 105 S.Ct. 2479, 2490 (1985). By affirming the grant of the preliminary injunction, the court of appeals correctly recognized that *Lynch* does not allow a municipality to send a message of endorsement in the guise of celebrating Christmas. Although *Lynch* allows the appropriate celebration of the Christmas holiday as it has developed in twentieth century America, it must not be distorted to allow the city's promotion of a religion itself. The St. Charles' cross celebrates Christianity, not Christmas. The First Amendment forbids this.

III. PETITIONERS HAVE PRESENTED NO COMPELLING REASON TO RECONSIDER *LEMON v. KURTZMAN* OR *LYNCH v. DONNELLY*.

Petitioners suggest that this Court should use this case to overrule the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Not only has this Court already reviewed and reaffirmed *Lemon* in a number of recent cases,[4] but even if the Court were to re-examine that case, this petition is an inappropriate vehicle for such a review.

First, this case is not yet in a proper posture for review because the factual record is incomplete. The only basis on which the district court and court of appeals rendered

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[4] *E.g., Wallace v. Jaffree*, 472 U.S.___, 105 S.Ct. 2479 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125, 127 (1982); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981).

opinions was the "effect" prong of *Lemon,* and even there the evidentiary record is not fully developed. The district court reserved decision on whether the cross had been motivated by a primary purpose of advancing religion or whether a fuller record would show unconstitutional entanglement. Any review by this Court of the applicability of the *Lemon* test would be premature.

Second, petitioners have failed to identify a single reason why *Lemon* is not an appropriate standard to apply here. Although St. Charles contends, in bald conclusory terms, that this case provides the Court with the opportunity to re-examine the "proper contours, purpose, and focus of the Establishment Clause doctrine," Petition at 13, St. Charles fails to show any conflict among the circuit courts over the application of *Lemon* or to give a single reason why this case requires a comprehensive re-analysis of fundamental Establishment Clause doctrine. Indeed, there is nothing about this case -- in which a municipality has elevated the central symbol of a single religion above all others -- that differentiates it from the hundreds of cases which have been carefully analyzed since *Lemon v. Kurtzman* was decided in 1971.

Third, petitioners do not propose any alternative formulation of *Lemon.* Indeed, even under the modifications proposed by Justices Rehnquist and O'Connor, the preliminary record here shows that the St. Charles cross still would not pass muster. The district court specifically examined the facts and determined that the display of the cross "sends a message to nonadherents that they are outsiders," App. 29a-30a, citing *Lynch,* 465 U.S. at 688 (O'Connor, J., concurring). Thus, the cross would not pass Justice O'Connor's "endorsement" test. *See also Wallace v. Jaffree,* 105 S.Ct. at 2497 (O'Connor, J., concurring). Nor could it satisfy the proposed test of Justice Rehnquist, which asks whether a particular sect has been singled out for special treatment, *Wallace,* 105 S.Ct. at 2513 (Rehnquist, J., dissenting) for as the lower courts noted, the latin cross is a highly sectarian symbol which

has the effect of conveying a message of government support of those who embrace it. App. 9a, 32a. There would be no different result under the proposed refinements of the *Lemon* test because non-Christians can only feel like outsiders in the shadow of this towering cross. The result here would be the same: this city's cross offends the First Amendment.

Finally, this case represents the logical and predictable application of precepts outlined by this Court only two years ago in *Lynch v. Donnelly*. Neither the district court nor the court of appeals had any difficulty applying *Lynch* and concluding that, while some municipal celebration of the Christmas holiday is permissible, it would be a major distortion of *Lynch* to suggest that it authorizes a highly visible and dramatic governmental endorsement of the central and most sacred symbol of one particular religion under the guise of celebrating Christmas, especially when that symbol is unrelated to the holiday.

Both *Lynch* and *Lemon* were applied correctly in this case by the lower courts. There is no reason for this Court to reexamine either the philosophical underpinnings of those tests or the manner of their application here.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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